

Constitutional Counsel Group

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December 30, 2021

Representative Timothy Ramthun
Wisconsin State Assembly
409 North, State Capitol
P.O. Box 8953
Madison, WI 53708

Re: Decertification of Elector Votes

Dear Representative Ramthun:

You have asked me to provide an opinion letter addressing whether a state legislature has the constitutional authority to decertify previously certified electoral votes for a candidate for the office of President of the United States upon a definitive showing of illegality and/or fraud sufficient to have altered the results of the election. I want to emphasize the “definitive showing of illegality and/or fraud” caveat, as that is in my view a necessary precondition for the legal analysis which follows. And I want to emphasize the “sufficient to have altered the results of the election” caveat as well, for even though I do not think that is *legally* necessary for the legislature to re-assume its plenary authority over the appointment of presidential electors, I do think it is *politically* necessary, or at least strongly advised as a matter of prudent statesmanship.

In preparation of this opinion letter, I have relied upon the relevant constitutional provisions (particularly Article II, Section 2), federal and state statutes, historical and judicial precedents, and general principles of federal constitutional law. I have also reviewed three legal memoranda directly addressing the question presented to me as it relates to the authority of the Wisconsin Legislature, namely: 1) Matt DePerno to Sen. Wendy Rogers, “Final Memo regarding Authority Over Elections and Electors” (Sept. 23, 2021) (“DePerno Memo”); 2) Wisconsin Legislative Counsel to Senator Kathy Bernier, “Legislative Authority to Decertify a Presidential Election” (Nov. 1, 2021) (“Legislative Counsel Memo” or “LC”); and 3) Michael Gallagher, Assistant Chief Counsel, Wisconsin Legislative Reference Bureau, to Representative Timothy Ramthun, “The state legislature’s power to recall presidential electors” (Nov. 22, 2021) (“Legislative Reference Bureau Memo” or “LRB”).

While I acknowledge that the question posed of me places us in uncharted territory, my conclusion is that the state legislatures, which exercise plenary authority under Article II of the United States Constitution to direct the manner for choosing presidential electors, do have the

authority to de-certify the election of presidential electors in their state upon a definitive showing of illegality and/or fraud in the conduct of the election sufficient to have altered the results of the election. In my judgement, that conclusion holds true following each of the five relevant events described below, even while I acknowledge that the counter arguments increase in strength with each successive event. Those events are:

- 1) Certification of the election at which electors are chosen by popular vote, according to state law;
- 2) The “safe harbor” date specified in 3 U.S.C. § 5, pursuant to which the final determination of any election contest shall be deemed “conclusive” if done according to procedures set out in state law prior to the election. For the 2020 election cycle, this date was December 8, 2020;
- 3) The date specified by 3 U.S.C. § 7 for electors to meet and cast their votes. For the 2020 election cycle, this date was December 14, 2020;
- 4) The opening by the Vice President and counting of elector votes in the presence of the joint session of Congress, set by statute (3 U.S.C. § 15) as January 6 at 1:00 p.m.
- 5) The inauguration of the President, which the Twentieth Amendment of the Constitution sets at Noon on January 20.

Constitutional Authority

Article II, Section 1, Clause 2 of the U.S. Constitution provides, in relevant part, that “Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” U.S. Const. Art. II, § 1, cl. 2 (emphasis added). The Supreme Court has described the constitutional authority of the state legislatures to determine the manner of choosing electors as “plenary.” *See McPherson v. Blecker*, 146 U.S. 1, 35 (1892); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000). It has even noted that, “whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power *at any time*.” *McPherson*, 146 U.S. at 35 (emphasis added, quoting with approval Sen. R., 1st Sess. 43rd Cong. No. 395); *see also Bush v. Gore*, 531 U.S. at 104 (“The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors”).

In the early decades of our nation’s history, most state legislatures selected the state’s presidential electors themselves; only after 1824 did the majority of state legislatures provide for choosing electors by popular election. Nevertheless, the constitutional power to decide on the method for choosing electors remains exclusively with state legislatures.

To be sure, the authority to take back the power of appointing electors “at any time,” as the Supreme Court recognized in the *McPherson* case, would likely not allow the Legislature to pick its own slate of electors *after* the results of a legal and fair election which had been

conducted pursuant to the Legislature’s existing statutory procedures, merely on the grounds that the Legislature would have preferred a different outcome. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental”). But such is not the case when the existing election laws – the “manner” chosen by the Legislature – are altered or ignored. In such cases, the “manner” for choosing electors set out by the Legislature was not followed; the constitutional default of the Legislature exercising its plenary power—or, rather, resuming that power—is therefore again at the forefront. *See id.* (noting that the right to vote in an election for presidential electors is fundamental when done in the manner “the legislature has prescribed”).

This is in accord with federal law as well. Section 2 of Title 3 provides: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2.¹ The intermingling of illegal with legal ballots in significant enough numbers that the election cannot be validly certified, means that the State “has failed to make a choice” on election day, and the appointment of electors therefore devolves back on the Legislature of the State, which has plenary power to decide whether to exercise that appointment power itself, or to craft some other mechanism for appointing the State’s slate of electors.

This is what the Florida legislature was prepared to do in 2000, prior to the resolution of that State’s election controversy by the Supreme Court in *Bush v. Gore*. The vote on election day had been certified by the Florida Secretary of State as a Bush victory, but the State Supreme Court had, contrary to state law, ordered a recount in only heavily-Democrat counties. The expectation was that such a partial recount would have tilted the election to Gore, and therefore either invalidated the initial certification or at least called it into question. The relevant committees in both houses of the State legislature therefore crafted identical resolutions that would allow the Legislature to reclaim the plenary power of choosing its own slate of electors (with the expectation that the Legislature’s slate would support Bush).²

¹ Some scholars contend that Section 2’s residual authority is limited to the concern that motivated the adoption of Section 2, namely, the circumstance when no candidate receives an absolute majority on election day in states that require a majority rather than merely a plurality for the election to be decided. *See* Mathew Seligman, *The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes* (October 1, 2021), unpublished paper available at SSRN: <https://ssrn.com/abstract=3939020> or <http://dx.doi.org/10.2139/ssrn.3939020>. The text of Section 2 is broader than that purpose, however, so there would need to be definitive evidence that the text is *limited* to that purpose, not just motivated by it. I am not aware of such evidence.

² *See* Dexter Filkins and Dana Canedy, “Contesting the Vote: The Legislature; Committees Approve Resolutions Allowing Florida Lawmakers to Name Electors,” *New York Times*, A25 (Dec. 12, 2000), available at <https://www.nytimes.com/2000/12/12/us/contesting-vote-legislature-committees-approve-resolutions-allowing-florida.html>.

Violations of State Election Law

Violations of state election law—which is to say, the “manner” that the Wisconsin Legislature had established for the choosing of President electors—are numerous. Here are some of the most obvious:

- Wis. Stat. § 6.86, which requires applicants for an absentee ballot to submit voter identification unless they are “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” County clerks in Dane and Milwaukee falsely notified voters in those counties that fear of Covid would qualify, and therefore accepted absentee ballot applications without the statutorily-required voter identification.
- Wisc. Stat. § 6.87(4)(b)(1), which mandates that absentee ballots “shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Election officials in Dane County allowed for absentee ballots to be returned to so-called “human drop boxes” rather than mailed or delivered in person to the clerk in an illegal ballot harvesting scheme dubbed “Democracy in the Park,” through which 17,271 illegal ballots were harvested.
- Wisc. Stat. §§ 6.86(3)(c), 6.87(2) and 6.87(6d), which provide that absentee ballots must be witnessed, and the witness must sign and provide his or her address. If the absentee ballot certification “is missing the address of a witness, the ballot *may not* be counted.” Yet election officials in Dane and Milwaukee counties hand-cured the missing information and then illegally counted those 4,469 ballots.

These statutory violations are material. The Wisconsin Legislature has specifically noted that they are designed “to prevent the potential for fraud or abuse” in voting by absentee ballot. Wis. Stat. § 6.84(1). Moreover, the illegal conduct affected significantly more ballots than the margin of victory, and is therefore more than sufficient to warrant the Wisconsin Legislature taking back its plenary power to determine the manner of choosing electors, even to the point of adopting a slate of electors itself. In my opinion, that would be true no matter when the illegality came to light and the Legislature determined to act.

Timing of Legislative Action

In this memo, I will address 5 distinct events on the timeline from election to inauguration and beyond during which the Legislature could act, as each presents slightly different legal issues.

Event #1: Certification by Elections Commission

The first event is when the election is certified by whomever has been delegated that authority by state election law. Under Wisconsin election law, that is the Elections Commission, which canvasses the votes received from county canvassing boards and then prepares a certificate for the Governor to sign and affix the seal of the State. Wis. Stat. § 7.70(5)(b). Significantly, the Commission Chairperson is required to “examine the certified statements of

the county boards of canvassers” for any “material mistakes.” *Id.* § 7.70(3)(b). If illegality in the conduct of the election (such as counting ineligible ballots, etc.) occurs, then that “material mistake ... made in the computation of votes” should be remedied by the Elections Commission, but if not, then the “manner” that the Legislature has directed for the selection of presidential electors has not been followed, and under the Supreme Court’s *McPherson* decision, the power to direct the appoint of electors devolves back onto the Legislature.

The Legislative Reference Bureau inadvertently acknowledges this point when, citing *Bush v. Gore*, it claims that “once presidential electors have been appointed *under state law* giving the people the power to elect the state’s presidential electors, ... [t]he legislature may not unilaterally unseat or reverse the votes of the slate of presidential electors chosen by the people at the presidential election.” LRB at 5 (emphasis added); *see also* LRB at 6 (“When the state legislature vests the right to vote for President in its people, the right to vote *as the legislature has prescribed* is fundamental”). The emphasized language is key, but its significance was overlooked by the Legislative Reference Bureau. The premise here is that the presidential electors were NOT “appointed under state law” or “as the legislature has prescribed,” and the issue is then controlled by *McPherson*’s recognition that the Legislature can reclaim its plenary power over the appointment of electors “at any time.”

Event #2: The “Safe Harbor” Provision of 3 U.S.C. § 5.

The second relevant event is what is colloquially called the statutory “safe harbor” of 3 U.S.C. § 5, which provides that if a State, prior to the election, has set out procedures for the final determination of any election challenge, and that process is concluded at least 6 days prior (Dec. 8 in 2020) to the day designated for electors to meet and vote, then “such determination ... shall be conclusive.” Significantly, though, such a determination must be “made pursuant to such law so existing” on the day of the election. Alterations of state election law by non-legislative officials undercuts the “conclusive” protection afforded by the safe harbor provision. Moreover, because election challenges were still pending in Wisconsin on December 8, *see Trump v. Biden*, 394 Wis.2d 629 (Wisc. S.Ct., decided Dec. 14, 2020), the safe harbor provision was not applicable in any event.

Event #3: The Meeting of Electors, 3 U.S.C. § 7.

The next relevant event is the meeting and voting of electors who had been certified pursuant to state law. The Twelfth Amendment (and its similar predecessor language in Article II) provides that “The Electors shall meet in their respective states and vote by ballot for President and Vice-President.” U.S. Const. amend. XII; *see also* U.S. Const. Art. II, § 1, cl. 3 (“The Electors shall meet in their respective states, and vote by ballot for two persons”). Section 7 of Title 3 of the United States Code sets the date for the meeting and voting as the first Monday after the second Wednesday in December – December 14th in the 2020 election cycle. Section 6 of the Electoral Count Act of 1887 recognizes, though, that the ascertainment of electors certified to cast votes on the designated date must be made “*under and in pursuance of the laws of such State providing for such ascertainment.*” 3 U.S.C. § 6 (emphasis added). The issue presented here is therefore what happens when the certification follows an election that was not conducted “*under and in pursuance of the laws of such State.*” That is the same issue overlooked by the

Legislative Reference Bureau discussed above. Neither state nor federal law provides an answer, and Article II, together with the Supreme Court’s interpretation of that provision in *McPherson*, indicates that the Legislature’s plenary power over the manner of choosing electors is revived in such a circumstance; otherwise, the “manner” for choosing electors directed by the Legislature, pursuant to its unquestioned constitutional authority, would be rendered a dead letter.

Moreover, as a matter of historical precedent, the certification and casting of votes on the day designated by 3 U.S.C. § 7 is not conclusive. Electors for Vice President Nixon were certified and met to cast their votes following the 1960 election. But when an election challenge in Hawaii was subsequently deemed to have determined that Senator Kennedy rather than Richard Nixon prevailed in Hawaii, electoral votes that had been cast for Senator Kennedy on the designated date (albeit without having been certified) were retroactively certified and, having met the statutory and constitutional requirements of voting on the designated day, were eligible to be counted at the joint session of Congress (as detailed, for example, in Nathan L. Colvin and Edward B. Foley’s 2010 *Miami Law Review* article, “The Twelfth Amendment: A Constitutional Ticking Time Bomb”). As with Hawaii’s alternate slate of Kennedy electors in 1960, President Trump’s slate of electors met on the designated day and cast conditional votes, ready to be retroactively certified should election challenges or other formal action warrant.

Event #4: The January 6 Joint Session of Congress, 3 U.S.C. § 15.

The next significant event on the timeline is the meeting of the joint session of Congress at which the ballots transmitted by the electors are opened and counted. The Twelfth Amendment (and the identical predecessor language in Article II) provides that “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” U.S. Const. amend. XII; U.S. Const. Art. II, § 1, cl. 3. Some have recently argued that the role of the Vice President (who is the “President of the Senate,” U.S. Const. Art. I, § 3, cl. 4), or of the Congress more broadly, is merely ministerial, a ceremonial counting of ballots transmitted. Section 15 of the Electoral Count Act of 1887 doesn’t treat the roles as merely ministerial, however, for that section allows for objections to be made and voted upon, even for certified electoral votes that were deemed conclusive under the safe harbor provisions of Sections 5 and 6 if Congress determines they were not “regularly given.” 3 U.S.C. § 15. Moreover, historical precedent establishes that some judgment must be made as to whether or not to count electoral votes that were of questionable validity (Vermont’s votes for Vice President John Adams in 1796; Georgia’s votes for Vice President Thomas Jefferson in 1800), and particularly when two sets of electoral votes have been transmitted to Congress (Florida, Louisiana, and South Carolina in 1876; Hawaii in 1960; Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin in 2020).

There is much historical dispute over whether the Twelfth Amendment delegates that judgment authority to the Vice President alone (he “opens” the ballots, and therefore arguably must decide which to open and which “shall be counted,” whereas that action is done merely “in the presence” of the House and Senate), or to the joint session of Congress acting as a single body, or to the two houses of Congress acting independently, or even whether it reserves it to the state legislatures pursuant to their authority under Article II. But whoever decides, the decision should be based on the legal validity of the electoral votes, which is to say, which votes were cast

according to the “manner” directed by the Legislature of the State pursuant to its Article II plenary authority. When, as happened this past election, the Vice President and/or Congress views its role as merely ministerial and counts electoral votes that were assertedly certified despite illegal or fraudulent conduct in a State that was contrary to the “manner” directed by the Legislature of that State, then the Constitution’s assignment of plenary power to the state legislatures is undermined.

One must acknowledge that we’re in uncharted territory here. The Legislative Reference Bureau’s contention “there is no historical or legal precedent for the DePerno Memo’s argument” that the Legislature has inherent authority to reclaim its plenary power when the “manner” for choosing electors directed by it has been altered, LRB at 4, ignores the Supreme Court’s statement in *McPherson* that the Legislature can reclaim its constitutional authority “at any time.” But even if one ignores that historical legal precedent as *dicta*, there is certainly no historical or legal precedent to the contrary for addressing the uncharted territory here. The Legislative Counsel’s claims that “[t]he Electoral Count Act does not provide for any procedure to reverse electoral votes after they have been counted by Congress and the Vice President has declared a winner,” WLC at 3, and that “[t]here is no mechanism in state or federal law for the Legislature to reverse certified votes cast by the Electoral College and counted by Congress, WLC at 1, while accurate, fail to account for the plenary power that the Legislature has directly from the Constitution. If there is such a power derived directly from the Constitution, as the Supreme Court held in *McPherson* and noted again in *Bush v. Gore*, then that grant of power to the state legislatures cannot be constrained by mere statute, either federal or state. The processes set out in the Electoral Count Act would have to give way to the exercise of power conferred elsewhere by the Constitution itself.

Event #5: Inauguration, U.S. Const. amend. XX.

The final event on the timeline, and the only one established by the Constitution itself, if January 20 at Noon, the time and day that the Twentieth Amendment fixes for the termination of a President’s term and, implicitly, for the inauguration of his successor. Even if the prior certifications could be challenged, the Legislative Council argues that this would be the point of no return because, “except in the case of presidential incapacity, impeachment is the only mechanism for removing a sitting U.S. President.” WLC at 1. The Legislative Council overstates the case, for although the Constitution provides for removal in two instances—conviction after impeachment pursuant to Article II, and temporary removal for incapacity pursuant to the 25th Amendment—neither purports to be exclusive, and neither deals with the present circumstance. If we assume for the present discussion that Biden did not actually win the election but that he did not have any involvement in the illegal conduct, then he was not *himself* engaged in a high crime or misdemeanor for which he could be impeached (and removing him would simply elevate Vice President Harris, another beneficiary of the illegal certification). Neither did the illegal conduct have any connection to any perceived incapacity, so the 25th Amendment is not relevant for the purpose, either. The simply fact is that the Constitution simply does not address the uncharted territory in which we find ourselves.

In such circumstances, the courts usually look to background principles of the common law to fill in constitutional gaps. One significant common law principle is that actions taken as

the result of fraud or illegality are void *ab initio*, and can be rescinded. See, e.g., *United States v. Bradley*, 35 U.S. 343, 360 (1836) (citing *Pigot's Case*, 11 Co. Lit. 27b (1614)). This principle has been applied to reverse a fraudulent election even after the election was certified and the illegally-certified candidate was sworn in and sitting in the legislature. *Marks v. Stinson*, No. CIV. A. 93-6157, 1994 WL 47710, at *15-*16 (E.D. Pa. Feb. 18, 1994), *vacated in part*, 19 F.3d 873 (3d Cir. 1994), *affirmed after remand*, 37 F.3d 1487 (1994). The Pennsylvania Constitution did not provide any mechanism for removal of a member of the legislature who had been certified pursuant to a fraudulent election, but the fraudulently-elected representative was nonetheless removed from office, the election overturned, and the true winner of the election seated instead. That “[t]here is no process under current law for the Wisconsin Legislature to ‘decertify’ an election,” as the Legislative Reference Bureau claims, LRB at 1 n. 3, does not mean that the Legislature cannot provide a remedy for outcome-determinative fraud and illegality in the conduct of the election, exercising powers it has directly from Article II of the federal Constitution, for as the Supreme Court stated in *McPherson*, “there is no doubt of the right of the legislature to resume the power [to appoint electors] at any time, for it can neither be taken away nor abdicated.”

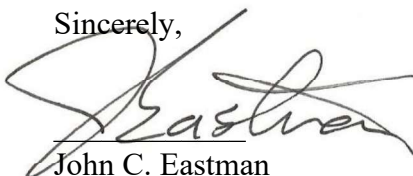
This renders somewhat irrelevant the Legislative Reference Bureau’s further discussion about burden of proof of fraud. The “manner” was violated. Power reverts back to the legislature to decide what to do. It can assess fraud and illegality to the extent it wishes. But it can appoint electors as it sees fit, according to *McPherson* and 3 U.S.C. § 2.

Finally, there is the issue of whether legislative action would require the governor’s signature or a veto override. Article 2 gives the legislature plenary power to determine the manner of choosing electors, even, as I contend, choosing electors itself when the manner it designated was not followed. The power is similar to that exercised by the legislature when deciding whether to ratify a constitutional amendment. Its vote is final, without the need for approval from the governor pursuant to requirements in the state constitution. That is because the power exercised by the legislature in such a case is not derived from the state constitution but from the federal Constitution, and cannot be constrained by limits imposed by state law.

The Supreme Court’s recent decision in the Arizona redistricting case held otherwise with respect to the elections clause, but that is a different clause, with different constraints. The power there is not plenary, for example, but can be overridden by Congress. And the Court’s decision has been criticized on Originalism grounds. I think the better assessment, and the one more directly on point, is *McPherson v. Blecker*, which actually dealt with the electors clause.

So, in my judgment, acknowledged illegality in the conducted of the election invalidates a certification. Article II’s plenary grant of power to the legislature is therefore revived in such circumstances, to be exercised as a majority of the legislature determines.

Sincerely,

A handwritten signature in black ink, appearing to read "Eastman", with a stylized flourish extending from the end of the name.

John C. Eastman